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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 1123

J. WESLEY GLASGOW, Appellant

vs.

WM. H. MOYER, Warden Appellee

BRIEF FOR APPELLANT

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STATEMENT.

This is an appeal from the United States District Court for the Northern District of Georgia denying the writ of habeas corpus applied for by the Appellant and dismissing his petition.

A motion for leave to file a petition for a writ of habeas corpus under the original jurisdiction of this Court was made by Appellant October 23d last averring the unconstitutionality of Section 211 of the Penal Code, under which he had been indicted in the United States District Court for the District of Delaware, the lack of jurisdiction in that Court to try him, and the deprivation by the Judge of the constitutional rights of Appellant, which motion, the special circumstances therein alleged, not being deemed sufficient, was, by the Court, *per*

curiam, citing ex parte Mirzan, 119 U. S., 584; Reggins vs. U. S., 199 U. S., 178, and in re Lincoln, 202 U. S., 178, on October 30th denied, the constitutional and jurisdictional questions not having been passed upon.

The case in Delaware then proceeded, the constitutional and jurisdictional questions having been properly raised in advance of trial, and over-ruled, the trial proceeded, objections being made, and exceptions reserved to adverse rulings, and a verdict of guilty returned by the Jury December 16, 1911; motions in arrest of judgment and for new trial were duly made and by the Court set for hearing on January 6, 1912. (R., p. 20.)

On January 2, 1912, under the provisions of Sections 20 and 21 of the Judicial Code, the Appellant filed his affidavit, certificate of counsel (R., pp. 23-5), with the clerk and paid him his fee, alleging prejudice and bias on the part of the presiding Judge, and requesting its certification as provided in said sections.

On January 6, 1912, the day fixed for the hearing, over the protest of Appellant, Judge Bradford disregarded the affidavit, overruled the motions in arrest of and for new trial sentenced the Appellant to fifteen months in the Atlanta Penitentiary, and a fine of $500 (R., pp. 25-8), and at midnight of that day, by a circuitous route, transported him to the penitentiary, where he is still confined.

To release him from what is contended to be an illegal imprisonment, application for this writ was made to the United States District Court for the Northern District of Georgia, where the Appellant was confined, directed against Colonel Moyer, the Warden of the penitentiary, in whose custody he was. Upon filing the petition the United States District Attorney appeared for the Warden, waived the issuance of a rule *nisi*, and demurred to the pettiion, and the case was thereupon submitted to the Court upon the record, and the demurrer was sustained and petition dismissed, from which order this appeal is prosecuted. (R., pp. 30-33.)

The petition and accompanying exhibits, which are made part of the record, present questions both as to the constitutionality of the statute, the denial to the Appellant of his constitutional rights, the jurisdiction of the trial Court, and the deprivation of the Appellant of any opportunity by bill of exceptions, writ of error or appeal to review not only the errors herein alleged, but of any of the many others that occurred during the trial.

ASSIGNMENT OF ERRORS.

First. The Court erred in refusing to declare Section 211 of the Penal Code, under color of which Appellant was imprisoned, was unconstitutional and void, because,

A The statute is not within the constitutional grant of legislative power to Congress, in that it does not confine its operation to depositing matter in the United States Post Office or other authorized depository for United States mail.

B. The statute does not inform Appellant of the nature of the accusation, nor is an offense described with any certainty.

C. That the statute is an *ex post facto* law.

D. That Appellant was deprived of his liberty and property without due process of law.

Second That Section 211 does create an offense against the United States.

Third. In holding that Sections 20 and 21 of the Judicial Code did not apply to the case at Bar.

Fourth. In holding that Judge Bradford had jurisdiction to impose the imprisonment complained of.

Fifth. In refusing the writ and dismissing the petition.

FIRST.

CONSTITUTIONAL QUESTIONS.

POINT A.

First. The question raised under Point A is that Congress exceeded its constitutional power in not confining the depositing matter in some authorized receptacle of the United States, or for delivery through the United States mail.

The only authority for this kind of legislation, if any exists, is under the grant in Section 8 of Article I, "To establish Post Offices and Post Roads," and whatever is necessarily incident to the exercise of that grant is the measure of their power.

Legislation must be confined to depositing mail matter somewhere within the jurisdiction of the postal system, or the delivery therefrom. This is well illustrated by the limitations set out in Section 215 of the Code, where the language is to "place, or cause to be placed, any letter, etc. * * * **in any post office, or station thereof, or street, or other letter box of the United States, or authorized depository for mail matter to be sent or delivered by the Post Office establishment of the United States,**" etc.

Again, in Section 213, the language is, "shall be deposited in * * * the mails of the United States." This language brings the offense within the power of Congress, but Section 211 contains no such limitation; the language there is, "Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable * * * shall be fined," etc.

Nor does the language of the preceding paragraph aid. All of that paragraph is merely directory to the United States officials; it simply declares what is non-mailable,

and then instructs its officers not to carry it in the mails; it is well within the constitutional grant so far as the physical character of the mails is concerned, but it has nothing at all to do with the citizen, or the penal part of the section.

The offense under Sec. 211 is not restricted to depositing in the United States mail, but depositing non-mailable matter anywhere; it does not even confine it to its deposit for the purpose of being carried in the United States mails, but wheresoever deposited for delivery, not through the mails, but in any way whatever, for any purpose whatever, it makes an offense against the United States.

This statute, by its broad terms, certainly exceeds the powers of Congress to enact, and is therefore unconstitutional and void.

In the case of United States vs. Steffens, 100 U. S., 82 (the trade-mark cases), this Court had this very question before it, and held that act to be void. It was there contended that there was authority for registration of trade-marks under the Commerce clause of the Constitution, but the trade-mark act not being confined to trade-marks used in interstate commerce, the Court declined to introduce into a penal statute words of limitation so as to make it specific when, as expressed, it is general only (p. 99).

Nothing could be broader than the language of Section 211. To bring it within the constitutional grant words of limitation must be imported into the statute, as said by Justice Miller in delivering the opinion, in above case (p. 99), quoting with approval the language of Chief Justice Waite, in U. S. vs. Reese, "To limit this statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty."

In the case of U. S. vs. Reese, U. S. 214, the Court held that a statute enacted under the Fifteenth Amendment to

the Constitution which did not limit the right of negroes to vote upon the grounds set out in that amendment, but which was broad enough to cover discriminations on account of other reasons, was too broad, and for that reason was unconstitutional and void. Chief Justice Waite, in delivering the opinion of the Court, says: "We are, therefore, directly called upon to decide whether a Penal Statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without, as well as within, the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightly prohibit and punish. For this purpose, we must take the sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not." And, again, the Court says, on page 221, "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large." In the case of the U. S. vs. Harris, the case of the U. S. vs. Reese, *supra*, was quoted with approval, and the Court, failing to find any constitutional authority for the enactment of Sections 5519 in the broad terms of the section, unhesitatingly decided against the constitutionality of the law, so in the case of Baldwin vs. Frank, 120 U. S., is to the same effect; see, also, U. S. vs. Harris, 177 U. S., 305; U. S. vs. Gooding, 12 Wheat, 460; U. S. vs. Sheldon, 2 Wheat, 119, and James vs. Bowman, 190 U. S., 127.

It therefore appears from a consideration of the foregoing cases, and cases cited by the Court therein, that Section 211 exceeds the lawful authority of Congress to enact, and must be held to be unconstitutional and void.

POINT B.

Section 211 is obnoxious to the guarantees contained in the Sixth Amendment of the Constitution, in that it fails by its lack of certainty and the absence of any standard contained in it to inform the accused of the nature and cause of the accusation. So far as the indictment is concerned, it probably is as good as the statute, but it yet leaves out any information by which the character of the offense can be ascertained. So far as the indictment goes we are charged with depositing a "certain obscene, lewd and lascivious book." But by what standard the character of the book or language of the contents are to be determined the statute does not define.

Among the instances where statutes have been held void for uncertainty are:

A statute prohibiting the hauling of more than 2,000 pounds on a narrow-tired wagon or more than 2,500 pounds on a broad-tired wagon, because it fixed no standard for determining what was a broad or a narrow tire. (Cook vs. State, U. Ind. App., 278.)

A statute authorizing the State Board of Health to revoke a physician's certificate for "grossly unprofessional conduct if of a character likely to deceive or defraud the public." (Matthew vs. Murphy, 23 Ky. L. Rep., 750.)

A statute punishing the larceny of a dog as in other cases of larceny, without saying whether it was grand or petit larceny. (Johnston vs. State, 100 Ala., 32.)

A statute that if any officer charged with the collection, receipt, or safe-keeping of public money shall convert to his own use, every such act should be deemed an embezzlement, etc., because it did not specify what must be converted to constitute the crime. (State vs. Taylor, 75 D., 533.)

A statute that "if any railroad corporation shall charge, collect or receive more than a just or reasonable rate of

toll or compensation for the transportation of passengers or freight," it should be deemed guilty of extortion, for lack of prescribing any standard by which to determine what was just and reasonable. (Louis. & N. R. Co. vs. State, 99 Ky., 132; 35 S. W., 129; 59 Am. St. Rep., 457; 33 L. R. A., 209.) In this case the Court said: "That this statute leaves uncertain what shall be deemed "a just and reasonable rate of toll or compensation" cannot be denied, and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends upon the jury's view of the reasonableness of the rate charged; and this latter depends upon many uncertain and complicated elements. * * *

"There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

So, also, in the District of Columbia a statute which uses the word "over-crowding" was bad (——— vs. R.R. Apl., D. C.), and "unprofessional conduct" was likewise held void in ——— vs. Czarra, 25 App., D. C., and cases there cited, and the words "drove or droves of cattle" held inoperative in McConville vs. Jersey City, 39 N. J. L., 38, and in case of U. S. vs. B. & O. S. W. R. R. Co., decided at the present term, the Court says: "If there be no ambiguity the words of the statute are the measure of its meaning; if there be ambiguity the character of the statute determines for a strict or liberal con-

struction. A criminal statute is strictly construed; Courts are not inclined to make 'constructive crimes.'"

The uncertainty of the statute in the use of the word "obscene" cannot be better illustrated than by referring to the variety of meaning that has been attached to it in the various prosecutions had under it in the various District Courts of the United States. Not less than 26 cases* have been before the District Courts of the United States for the definition of the words of this statute, and the various definitions have been almost as numerous as the cases before them. *Tot homines quot sententiae.* Few completely agree, many are in direct and irreconcilable conflict with each other. It has been held that the motive and intent is material, and that it is not material. That the person to whom the book is sent is material, and that it is not material. That medical works can be sent through the mails, and that they cannot be. That if obnoxious to good taste it is obscene, and that "not in good taste" is no criterion. That to be obscene it must appear so the pure, not to the impure, and that this is no test. That comparisons may be made with standard works, and that they cannot be so made. It is not ob-

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U. S. vs. Bennett, Fed. case 14, 571; U. S. vs. Britton, 17 Fed Rep., 733. U. S. vs. Brazeau, 78 Fed. Rep., 465; U. S. vs. Coleman, 131 Fed. Rep., 829; U. S. vs. Commerford, 25 Fed. Rep., 903; U. S. vs. Clark, 37 Fed. Rep., 107; U. S. vs. Cheesman, 19 Fed Rep., 498; U. S. vs. Clarke, 33 Fed. Rep., 402; U. S. vs. Clarke, 38 Fed. Rep., 734; U. S. vs. Davis, 38 Fed. Rep., 327; U. S. vs. Debout, 28 Fed. Rep., 523; U. S. vs. Harman, 45 Fed. Rep., 421; U. S. vs. Lamkin, 73 Fed. Rep., 463; U. S. vs. Moore, 129 Fed Rep., 160; U. S. vs. Martin, 50 Fed. Rep., 921; U. S. vs. Males, 51 Fed. Rep., 42. U. S. vs. Redd, 176 Fed. Rep., 944; U. S. vs. Smith, 45 Fed. Rep., 418; U. S. vs. Smith, 45 Fed. Rep., 477; U. S. vs. Shepherd, 160 Fed. Rep., 584; U. S. vs. Slenker, 32 Fed Rep., 695; U. S. vs. Smith, 11 Fed. Rep., 664; U. S. vs. Timmons, 85 Fed. Rep., 205; U. S. vs. Wroblensky, 118 Fed. Rep., 496; U. S. vs. Williams, 4 Fed. Rep., 485; U. S. vs. Wrightman, 29 Fed. Rep., 636.

scene if free from immoral language, and it is obscene even though couched in chaste words, and many other illustrations might be cited, but the sum and substance of it is that, so vague and uncertain is the language, that it is left to judicial legislation to ascertain what the law is, and at length to the whim of a jury to determine after the act what the law is. This judicial construction has presented a case where for mailing the same book, at three different times, followed by three indictments, under two of them the accused was acquitted because the jury held the book was not obscene, and under the third indictment was convicted, the same book being held by that jury to be obscene. (This case, U. S. vs. Sherman, is reported from stenographic notes in Mr. Anthony Comstock's work, "Morals Not Art or Literature," page 33.)

Under such a statute no one's liberty is safe for a moment, nor is it impossible for the legislature to affix a fixed and definite meaning to the words it employs. The word "indecent" has had its meaning defined by the Act of 27 May, 1908 (35 Stat., 416) in the following language: "Section 3893, Rev. Stat., be amended by adding thereto the following, 'and the term "indecent" within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination,' and there seems to be no good reason why 'obscene' should not be similarly defined."

POINT C.

The uncertainty of the law is as obnoxious to "due process of law" as it is to the requirement of informing the accused of the nature of the accusation against him.

Until the legislature has defined a crime in definite words it has not made a valid law; there can be no due process of law to enforce it.

The deprivation of Appellant of the rights vouched safe to him in the Fifth Amendment to the Constitution,

and set out in the petition and admitted by the demurrer, accomplished his imprisonment without due process of law. Where the indictment was not by the grand jury, but was amended by the District Attorney, his property seized without warrant, correspondence with counsel censored and denied, evidence not allowed to be presented, challenges refused, and jury drawn by interested persons, certainly deprives the proceedings of every element of due process. If an act of Congress authorizing the Court to require the defendant to produce papers is void, as in violation of the Fourth and Fifth Amendments to the Constitution, as held in Boyd vs. U. S., in 116 U. S., 616, can it be said that the seizure *vi-et-ar-mis* by the District Attorney without warrant and suppressing them with the knowledge of the Court, does not so far invalidate the proceeding as to them **undue**, rather than "due process of law."

POINT D.

That such uncertainty in a statute creating a punishment for an act which is *malum prohibitum* only, which in its practical operation and enforcement unavoidably involves judicial legislation in defining the crime after the commission of the act, whether left to the Court or to a Jury, is an *ex post facto* law, and carries with it all the evils that the framers of the Constitution sought to avoid by forbidding such enactment.

The criterion of guilt must be fixed in advance of the act, and not left to the whim of a Court or Jury to fix after its commission.

If one is never to be able to ascertain until after a verdict of guilty has been pronounced against him whether he has committed a violation of law, and the law which he is supposed to have violated is to be evolved out of the inner consciousness of a dozen men chosen by lot long after the event, then all the tyranny and injustice

that Amendment Six forbid to Congress itself can be restored by an irresponsible jury.

In this case Appellant contends that the indictment not being by the Grand Jury in all its parts, as required by Amendment Five, it is not only in violation of that article, but also void as not constituting due process of law.

The case of Rosen vs. U. S., 161 U. S., 29, involved an indictment for mailing an obscene paper, under Section 3883, R. S.

The paper in question contained twelve pages, and it was claimed that the indictment was fatally defective because it did not set out with reasonable particularity the parts of the paper relied on to support the charge in the indictment, that it was in violation of the Sixth Amendment of the Constitution, and did not inform the defendant of the nature and cause of the offense charged. In this case no objection was made before trial to the sufficiency of the indictment, no objection made to the introduction of the paper at trial on the ground that was not sufficiently described in the indictment, and defendant offered a copy in evidence in his own behalf, no motion for bill of particulars being made. In these circumstances, a majority of the Court, in an opinion by Justice Harlan, held that the judgment should not be set aside, and that was all that can be considered as authority in that case.

SUFFICIENCY OF INDICTMENT.

The opinion of the Court, however, is expressly put upon the ground that no objection was made by the defendant before the verdict, which might be said to amount to a waiver of his constitutional right in that regard, and that he made his defense upon the broad ground only that the paper in question was not obscene. In the case at Bar the objection was promptly made,

before the trial, and while the District Attorney furnished a bill of particulars, the matters presented to the jury were entirely dependent upon his personal opinion and not that of the Grand Jury which made the indictment. In the Rosen case the paper contained 12 pages, in this 114. And the alleged obscene parts presented to the jury, and upon which the defendant was tried, which were prepared and designated by the United States Attorney, may have contained much more matter than was found objectionable by the Grand Jury, or matter **entirely different** from that which the Grand Jury found, or which they found not to be obscene at all. In effect, the defendant was tried upon an indictment found by the United States Attorney, whereas the Fifth Amendment to the Constitution requires that the indictment shall be rendered by a Grand Jury.

The facts and record in this case make it distinguishable from the Rosen case; the attention of the Court is earnestly invited to the dissenting opinion of the present Chief Justice and Mr. Justice Shiras in the Rosen case, where it is said, in part: p. 47

"Indeed, the correctness of the ruling in Com. vs. McCance, we think, results from the very nature of things. It being unquestionable that a Grand Jury must find an indictment in order that the prosecution be valid, how can it be said that there has been such a presentment when on the very face of the record it is absolutely impossible to determine what matter the Grand Jury charged to be obscene? To say that it can be applied by a bill of particulars or otherwise is a misconception, for it becomes impossible to supply that which does not legally exist. The Constitution requiring that the Grand Jury should find the indictment, neither the Court, the prosecuting officer, nor any one else, has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitu-

tional safeguards. The general rule requires an indictment to be specific. Stephens vs. State, Wright (Ohio), 73; Com. vs. Gillespie, 7 Serg. and R., 469; 10 Am. Dec., 475; Com. vs. Stow, 1 Mass., 54; Com. vs. Bailey, 1 Mass., 62; 2 Am. Dec., 3; Com. vs. Sweney, 10 Serg. and R. 173; Com. vs. Wright, 1 Cush., 46; Com. vs. Tarbox, 1 Cush., 66; Com. vs. Houghton, 8 Mass., 107; King vs. Beere, 12 Mod., 219; State vs. Parker, 1 D. Chip. (Vt.), 298; 11 Am. Dec., 735. See also Com. vs. Stevens, 1 Mass., 203. To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by a Grand Jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even although it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified disappears, and the result logically leads to the recognition of the right of a Grand Jury to present without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus made that which is absolutely void a valid instrument." The wisdom of the rule announced in Com. vs. McCance was well illustrated by the indictment presented in that case, as it is by the alleged indictment under consideration here. Will it be said that an indictment which charged that an accused published obscene matter contained in twenty volumes of books called the "Encyclopaedia Britannica or Americana," giving the title page, and followed by the statement that a more minute description would be offensive to morality, would be adequate? And yet what difference exist, except in degree, between such an indictment and the one here held to be valid? Nor is it

logical to say that as an accused has no right to know the secrets of a Grand Jury room, therefore he is not entitled to be informed as to the matter upon which the Grand Jury bases its presentment. The Constitution forbids in a certain class of cases prosecution except by indictment, and, therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is enitled, under the Constitution, to know the secrets of the Grand Jury room.

SECOND.

The Statute Does Not Create an Offense.

There is no valid law of the United States making the mailing of an obscene book a crime, or one which forbids it.

The present law, Section 211, Penal Code, reads as follows:

"Sec. 211. Every obscene, lewd, or lascivious, and every filthy book, pamphlet * * * is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter-carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 3893, R. S.—the old law—**repealed** by Section 341 of the Penal Code, reads as follows:

"Sec. 3893. No obscene, lewd, or lascivious book, pamphlet, * * * shall be carried in the mail; and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, * * * **shall be deeemed guilty of a misdemeanor,** and shall, for every offense, be fined not less than Five Thousand Dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both."

Section 341 of Chapter 15 of the Penal Code provides as follows:

"Sec. 341. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed: Sections * * *; Sections Thirty-eight hundred and ninety to Thirty-eight hundred and ninety-four, both inclusive; * * *"

"Sec. 345. This Act shall take effect and be in force on and after the first day of January, nineteen hundred and ten."

Approved March 4, 1909.

Until a lawful act is made by apt and direct words an offense its commission is not subject to either arrest or indictment.

The mere affixing of a fine or an imprisonment to a lawful act does not *ipso facto* convert it into a felony.

There are no common law offenses against the United States.

Section 341 of the Penal Code having expressly repealed in direct language every vestage of law on this subject, a felony, if one now exists, must find its sanction in the language of Section 211.

That section does not create it a misdemeanor as Section 3893 of the R. S. did.

It does not forbid or make unlawful the mailing of an obscene book.

It simply, without declaring it a felony or misdemeanor or other offense, or even forbidding it, simply attaches a punishment to a lawful act.

A crime cannot be created by implication or construction.

U. S. vs. Eaton, 144 U. S., 677.
Blackstone, Vol. 4, Page 15.
U. S. vs. Sudson, 7th Cranch, 32, vs. Reese, 92 U. S., p. 216.
Johnson vs. State, 100 Ala., 32.

The case cited, *supra*, showing the necessity of certainty in a statute, are also applicable to this question.

THIRD, FOURTH AND FIFTH.

These questions go to the jurisdiction of the Court founded upon the applicability of Sections 20 and 21 of the Judicial Code.

The legislation in Section 21 of the Act of March 3, 1911, is a new departure in the Federal Judiciary, it for the first time gives to the prisoner the right to challenge the presiding Judge for prejudice; while jurors have ever

been subject to challenge for cause and without cause, no way had ever been provided by which a biased Judge could be disqualified, and it is to the everlasting credit of our Judiciary that little harm has ever come by such omission.

A Judge conscious of bias would not hesitate to invite another of his brethren to take his place. This act, while new, has no terror to an upright Judge. At the first intimation that a prisoner harbors such a thought a Judge, conscious of his own integrity, would be impelled to shrink from presiding at his trial and would aid in every way to free the pure fountain of justice from such an imputation, no matter from what source it arose. On the other hand, the act is a valuable weapon to defeat an unworthy Judge from making a mockery of the administration of justice, and seek by fawning to unworthy power to advance his personal ambition.

To avert such a calamity it is a powerful weapon in behalf of liberty and justice.

No better illustration could be found than the case at Bar, where the benign provisions of the statute can be invoked to protect the citizen from malice and persecution; and the cogent reasons given for its invocation were conceded by the Judge himself to be such, if true, as to fully justify his disqualification, and surely it was not intended that the Judge himself, the object of the charges, should decide upon their truth.

The act is a remedial one and entitled to liberal construction in the interest of a fair and impartial trial, guaranteed by the Constitution to the humblest citizen, and the fairness and impartiality must abide with the proceedings from their inception through its every stage until its final conclusion.

A Judge who exhibits and betrays his prejudice while the case is being presented before the Jury and by his bias robs the proceedings of every element of impartiality and coerces a verdict of guilty by methods that shock one's

sense of justice, ought not to be permitted to pass upon a motion in arrest of judgment founded upon his own misbehavior or a motion for a new trial grounded on his own errors, but in the interest of a fair and impartial trial he ought to be **lawfully recalled,** not by the infamous doctrine now being preached by demagogues on the hustings, or practiced at Hillsville, but by the calm, judicial method prescribed of this law, it can work no serious harm to an upright Judge. The certificate of counsel bars the way to its improper use in the first instance, and there is no doubt that the reasons assigned by the litigant must be such that the Circuit Judge or the Supreme Court Justice must at least consider sufficient to make a *prima facie* case, nor would it be an unreasonable construction of the act should such Judge or Justice become the tryers of the truth of the challenge; be that, however, as it may, there certainly is no ground for holding that the challenged Judge shall himself pass upon the question of his own eligibility.

A suggestion that the certificate may be made unscrupulous counsel avails naught. In my judgment the reputation of our Judges is not unsafe in the keeping of the Bar, and no such thing as "unscrupulous counsel" ought to exist, and should it unfortunately so happen, the Judges themselves are not blameless for its occurrence; for they are clothed with full power and jurisdiction to strike from its roll of honor any attorney who fails to observe his professional oath, and in such efforts they are uniformly sustained by the full, active co-operation and hearty endorsement of its Bar.

The words of Section 21 are general and sweeping, and contains no proviso or exception in favor of cases pending when the law went into operation. It is a matter of procedure only, hence there could be no implication that it was intended that in the same Court at the same time different methods should be in force. That a person charged with committing an offense on December 31st

should be tried by a prejudiced Judge, while one committing a similar offense the next day should be tried by an impartial one. The very language that directs that the "Judge shall proceed **no farther** therein," "whenever a party to any action or proceeding shall **make** and **file** an affidavit," shows conclusively that it was to be availed of after proceedings had been had. While the section required it to be filed ten days before the beginning of the term, if good reason for failure to do so was shown it could be filed at any time. The act clearly authorizes the filing of the affidavit, but in this case the Judge forbids even its filing. The docket, if truthfully kept, would show an entry of the filing of the affidavit on January 2, 1912 and the receipt by the clerk of his fees for so filing. But in default of a proper record resort had to be had to evidence *aliundi* to establish the filing of the affidavit, etc.

When Section 21 of the Act of March 3, 1911, went into effect on January 1, 1912, there was pending in the United States District Court of Delaware a proceeding, to wit, a motion in arrest of judgment and a motion for a new trial duly filed on the 21st day of December, 1911, and on December 23, 1912, duly set down for hearing, to take place on January 6, 1912, at 11.30 a. m., as appears by the docket entries (R., p. 20), this proceeding was certainly subject to the operation of that section, and clearly came, not only within the letter, but the spirit and intent of the law.

There is no general saving clause in this act bearing any relation to this case. Section 300, which attempts to save a class of prior cases, is foreign to this. The offense with which the petitioner stands charged was under Section 211 of the Act of March 9, 1909, known as the Penal Code, no part of which was embraced in, amended or repealed by the Act of March 3, 1911, nor does Section 299, which refers only to appeals, have any bearing on the question, but even though it had, it being so clearly repugnant to the clear words of Section 21, it

would by universal authority have been void for its repugnance, but this doctrine is not necessary in this case to rely upon.

Among the many cases on statutory construction that treat analagous subjects the cases Taylor vs. U. S., 4 Howard, 197; Yeaton vs. U. S., 5 Cranch, 281; State vs. Norwood, 12 Md., 195; Hersburg vs. People, 6 Colo., 145, and many others, seem to be directly in point. In Brown vs. Maryland, 12 Wheat., 438, Chief Justice Marshall says: "It is the rule to which all assent, that an exception of a particular thing from the general words proves that the accepted thing would have been within the general words had no exception been made; how much clearer is it that when no exception is made the general words cover the entire subject." In the Colorado case it was held "that whenever there is a repeal or change in a criminal statute, unless there is a saving clause, either express or by clear implication, the new statute or modification and the new conditions take effect in pending cases, and every step taken thereafter under the old law will be **utterly void.**"

So far as counsel can ascertain, but one other case has arisen under this act. In the Eastern District of New York, in a Bankruptcy proceeding.

A similar affidavit was filed after innumerable orders had been passed, and it was promptly certified to the Senior Justice of the Circuit, who immediately designated another Judge.

All of which is respectfully submitted.

JOHN C. FAY,
CHAS. C. MILLER,
Attorneys for Appellant.

Supreme Court, U. S.
FILED.
MAY 20 1912
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 1123

J. WESLEY GLASGOW, Appellant

vs.

WM. H. MOYER, Warden Appellee

REPLY BRIEF FOR APPELLANT

JOHN C. FAY
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COLUMBIAN PRINTING CO., INC., 615 14th ST.

IN THE

Supreme Court of the United States

J. WESLEY GLASCOW,
Appellant,
vs.
WM H. MOYER,
Warden, &c.
} No. 1123.

OCTOBER TERM, 1911.

REPLY BRIEF OF APPELLANT.

For reply to the brief of the Honorable Solicitor General, the Appellant contends: That it fails to meet or refute the authorities cited, or the argument advanced in his behalf.

A mere reading of the statute does not show it to be confined within constitutional limitations, any more than the statute covering counterfeiting of trade-marks was confined to trade-marks used in interstate commerce, or the statutes ostensibly passed for the protection of the elective franchise and other rights was within the grant under the Fifteenth Amendment when the language did not limit the operation of the law to the causes assigned in that amendment nor in the income tax case. While part of the law was within the constitutional power of Congress, they were

broader than that power. All of these statutes have been held by this Court to be unconstitutional on this very ground. It is unfortunate that the Solicitor General could find no authority whatever for his contention and of necessity was compelled to let it rest upon naked assertion.

If his contention is well grounded the designation of places where mail matter must be deposited, so carefully described in Section 215 of the same Penal Code in order to bring the offense under the ban of the statute, becomes utterly unnecessary and mere surplusage. Nor is the fact that this section is found under the title "Offenses against the Postal Service," of any avail, especially in view of Section 339, as follows: "Sec. 339. The arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed."

Under the present construction of this law, the record in this case on appeal could not be transmitted to this Court by mail, and if sent by express the Clerk of this Court would be subject to indictment under Section 245 of the Penal Code for receiving it. The book itself was filed as the Bill of Particulars, and the Appellant is also under indictment for receiving it from the United States Express Company.

The Solicitor General is not happy in his selection of the case of *Rosen* (161 U. S., 29) as an authority in favor of the constitutionality of the statute. That was not the question in that case. The objection there was solely upon the indictment, not whether the statute itself was unconstitutional, and the Court held, and held only, that the defendant, having failed to avail himself of the objections at the proper time before trial, it was too late after verdict to

take advantage of his own neglect, and under Section 1025, Rev. Stat., these defects were cured by the verdict. It is undoubtedly true that many of the provisions of the Constitution are not self-executing, and a defendant by his own act or declaration may waive them. While the Constitution provides for a trial by jury, it is not at all unusual for a prisoner to waive a jury trial and elect to be tried by the Court; so, he has the right to have the assistance of counsel for his defense. Is it possible that if he elects to be tried by the Court, and refuses to permit counsel to be assigned to him, that after conviction he can have all proceedings set aside because he was not tried by a jury? And does not the same condition arise if he fails to avail himself of it by neglect? This, it is submitted, is all that the Rosen case is authority for, the balance of the opinion must be treated as *obiter*, and has only to sustain it the persuasiveness of its own logic and the acknowledged ability of the eminent jurist that penned it. On the other hand, the dissenting opinion challenges its conclusions, and if more forceful or more persuasive and more in accord with the principles and intent of the framers of the Constitution, ought it not, I most respectfully submit, to prevail.

That the word obscene is one of common speech and so, perfectly understood, I deny. I do not seek to open the mails to the circulation of that class of publications that shock decency, but I do hope that this law may be so amended by describing an offense that it will not be a menace, among others, to the publishers of medical works; so that the Young Men's Christian Association may issue tracts that will warn young men of the dangers of illicit love and the frightful penalties of its indulgence which, by methods now in vogue, subject them to prosecution, and also to avoid the dangers pointed out by that distinguished jurist, Edward Livingston, viz: "Use the

general expression of the English law, and a fanatic judge, with a like minded jury, will bring every harmless levity under the lash of the law; sculpture and painting will be banished for their nudities, poetry for the warmth of its descriptions, and music, if it excites any forbidden passion, will hardly escape."—(Hunt's "Life of Edward Livingston." p. 289). The present administration of this law punishes the innocent and lets the guilty escape, as is well illustrated in *U. S.* vs. *Lamkin*, 73 Fed. Rep., 463, and medical societies and purity workers have already felt the injustice of the uncertainty of this statute. (*Medical Record*, Oct. 12, 1907, pp. 599-600.)

There is no necessity to use the indefinite word "obscene." Matter that ought not to be carried in the mail can be described in such definite language that a "wayfaring man, tho' a fool, may read as he runs," something that will not debar ninety per cent of medical works from carriage in the mails, language that can be passed upon on demurrer and not left to the opinion of an Irish policeman, a German justice of the peace, and a prudish district attorney as literary critics. There are words that have a definite meaning, and others that have not. The word *stone* suggested by Mr. Justice Holmes is not obscure, for the article designated as "a stone" can easily be determined by a chemist; it is one of the words that is susceptible of most definite determination; but "obscene" varys with every mind according to its context, to its motive and to the surrounding circumstances. It cannot be said to have acquired any technical meaning. *U. S.* vs. *Harman*, 45 Fed. Rep., 417.

The objection to the affidavit of prejudice is not well taken. The case had not been "tried." No judgment had been entered, the question whether or not the verdict should ever ripen into a conviction was *in fieri*. *It was to be heard*, and after a hearing the judicial discretion of the presiding

judge was to be exercised in determining what punishment should be inflicted. It might have been a fine of one dollar, or a fine of five thousand dollars and imprisonment in the penitentiary for five years. Ought a judge who had permitted a defendant to be brought into his presence in the uniform of a convicted felon, who sustained the District Attorney in seizing, by unlawful means, and retaining defendant's personal property and papers necessary for his defense; who justified the clerk in garbling the proceedings of the trial, and refused to permit the stenographic report taken by the deputy clerk to be produced to correct them; who in most unjudicial and heated language even denounced his attorney as "morally and professionally depraved" for seeking to invoke in his favor his plain rights, be permitted to pass *sentence*, which could not be modified in any appellate tribunal? Should he be allowed to *settle* the bill of exceptions, and by the arbitrary exercise of his power deprive the defendant of an honest review of alleged errors? If this be so, then the plain words of the statute must be disregarded, and unless a defendant knows in advance of the prejudice of the judge, and cannot avail himself of knowledge that only comes to him after trial is begun and is developed during its progress; the provision for filing at any time "on good cause shown" is unavailing, the command that the judge shall proceed "NO FURTHER" be disobeyed and the most important provisions of the statute nullified; nor is the doctrine that a writ of habeas corpus cannot avail where an appeal or writ of error lies without its exceptions, the cases cited, *per curiam*, of *ex-parte Merzan*, 119 U. S., 584; *Reggins* vs. *U. S.*, 199 U. S., 178; *in re Lincoln*, 202 U. S., 178, fully sustain this, and the Appellant confidently maintains that the circumstances shown in this case are more aggravated than those in the cases cited. I would not dare to refer to occurrences that

took place at the trial not in the record, lest they might be thought to be beyond belief. The matters charged to be immaterial simply corroborates the allegations of the petition, and the lashings inflicted by Crawford (that were taking place at the very moment the sentence was being passed), in whose care and custody the defendant was placed, only illustrate the brutality of the man who, with the consent of the judge, was permitted to enforce against the defendant during his trial the prison rules set out on page 11 of the record, Exhibit F.

The other questions in Appellant's brief are equally relied on and insisted upon.

All of which is respectfully submitted.

JOHN C. FAY,

CHAS. COLDEN MILLER,

Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

J. WESLEY GLASGOW, APPELLANT,
v.
WILLIAM H. MOYER, WARDEN OF THE United States Penitentiary at Atlanta, Ga. } No. 1123.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE.

The appellant, J. Wesley Glasgow, was indicted at the September term of the District Court of the United States for the District of Delaware, for a violation of section 211 of the Penal Code, 35 Stat. 1088, 1129, committed by depositing in the post office at the city of Wilmington, Del., for transmission through the mails to Frank Wolf, 1215 Court Street, Scranton, Pa., an obscene, lewd, lascivious, and indecent book. (R. 14, 15.) He was tried by a jury and found guilty, and then moved for a new trial and in arrest of judgment; all prior to January 1, 1912. The motions were set to be heard on January 6, 1912. (R. 20 to 22.)

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On January 2, 1912, he made an affidavit, which was certified to by counsel as having been made in good faith, charging the judge before whom he had been tried with bias and prejudice against him and in favor of the United States attorney for the District of Delaware. The various rulings of the judge on the trial of the case are assigned as the reasons for the belief of the affiant that the judge was thus prejudiced. The judge none the less proceeded to the determination of the motions, overruled both, and sentenced Glasgow to a fine of $500 and imprisonment in the United States penitentiary at Atlanta, Ga., for a period of 15 months. (R. 21.)

In March, 1912, Glasgow presented a petition for a writ of habeas corpus to W. T. Newman, judge of the United States District Court for the Northern District of Georgia. The judge was of the opinion (R. 31) that the petition failed to state a case and accordingly denied the writ, and from that action an appeal was taken to this court.

In support of the appeal it is contended that the statute upon which the indictment was based is void; that the indictment does not inform the accused of the nature of the charge against him; and that the judge had no right to deal further with the case after the presentation of the affidavit charging prejudice.

The statute

is as follows, viz:

> SEC. 211. Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter, containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or

> for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

It is said this statute is too broad in its terms and assumes to punish the transmission of obscene publications otherwise than through the mails. A reading of the statute answers this.

It is objected also that the statute is vague and indefinite, because it does not define the words "obscene, lewd, and lascivious." These are not words of art, but of common speech and of plain meaning. They need no statutory definition. The law was upheld against this objection in *Rosen* v. *United States*, 161 U. S. 29.

The further objection is made that the statute does not make the act which is the subject of the indictment a crime, but simply attaches a penalty to it. This is quite sufficient and is true of most of the penal

enactments of the United States. It is not necessary that in each case the act shall in very words be declared unlawful and a misdemeanor or a felony. That it is prohibited and subjected to punishment makes it unlawful and a crime.

The indictment

will be found on pages 14 to 16 of the record. It charges that the defendant deposited a book in the post office at Wilmington, Del., for transmission through the mails to Mr. Frank Wolf at Scranton, Pa. The book is identified by description and by setting out its title page, and it is charged that this book is obscene, lewd, and lascivious, and so bad in this respect that it would be offensive to spread its contents upon the records of the court. It is also charged that the defendant had knowledge, information, and notice of the contents of the book when he mailed it. He was thus well advised of the charge against him.

The affidavit of prejudice

had no place in this case. The statute which it is contended justifies it is section 21 of the Judicial Code, 36 Stat. 1087, 1090, and reads as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the

> suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

This act did not become effective until January 1, 1912. The case had been tried. Only the motion for new trial and that in arrest of judgement remained for disposition. The act was not retrospective, but looked altogether to the future. Its terms could not be complied with in a case already tried as this one had been. The affidavit could not be filed in time.

Beyond this, the act does not contemplate that in any case a litigant may without objection enter upon a trial before a judge, and when that trial has pro-

ceeded to its close, with a result disappointing his hopes and expectations, set at naught all that has been done, by a charge of prejudice against the judge, based, as is the case here, upon the rulings and orders made by the judge in the course of the trial.

In any event, the sentence can not be dealt with as void. The court had jurisdiction of the case. The verdict of guilty was plainly authorized, and if in the subsequent action of the court there was error it can not be reviewed or corrected on a petition for a writ of *habeas corpus*.

There is much irrelevant matter in the record with which it is not necessary to deal.

It is respectfully submitted that the order of the district judge denying the writ was right.

F. W. LEHMANN,
Solicitor General.

MAY, 1912.

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OPINION

GLASGOW *v.* MOYER, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 1123. Argued May 13, 1912.—Decided June 7, 1912.

The writ of *habeas corpus* cannot be made to perform the office of writ of error.

The rule that on *habeas corpus* the court examines only into the power and authority of the court restraining the petitioner to act, and not the correctness of its conclusions, *Metter of Gregory*, 219 U. S. 210, applies where the petitioner attacks as unconstitutional, or as too uncertain, the law which is the foundation of the indictment and trial.

Where the court below has remitted the petitioner to his remedy on writ of error, it would be a contradiction to permit him to prosecute *habeas corpus*.

A defendant in a criminal case cannot reserve defenses which he might make on the trial and use them as a basis for *habeas* proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice.

THE facts are stated in the opinion.

Mr. John C. Fay, with whom *Mr. Chas. Colden Miller* was on the brief, for appellant:

Section 211 of the Penal Code is unconstitutional

Congress exceeded its constitutional power in not confining the depositing matter in some authorized receptacle of the United States, or for delivery through the United States mail.

There is no authority for this kind of legislation under the grant in § 8 of Art. I, "to establish Post Offices and Post Roads."

This statute, by its broad terms, certainly exceeds the powers of Congress to enact, and is, therefore, unconstitutional and void. *United States* v. *Steffens*, 100 U. S. 82; *United States* v. *Reese*, 92 U. S. 214; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Gooding*, 12 Wheat. 460; *United States* v. *Sheldon*, 2 Wheat. 119; *James* v. *Bowman*, 190 U. S. 127.

Section 211 is obnoxious to the guarantees contained in the Sixth Amendment to the Constitution, in that it fails by its lack of certainty and the absence of any standard contained in it to inform the accused of the nature and cause of the accusation. *Cook* v. *State*, 26 Ind. App. 278; *Matthew* v. *Murphy*, 23 Ky. L. Rep. 750; *Johnston* v. *State*, 100 Alabama, 32; *Louis. & N. R. Co.* v. *State*, 99 Kentucky, 132; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443; *McConville* v. *Jersey City*, 39 N. J. L. 38; *United States* v. *Balt. & Ohio S. W. R. R. Co.*, 222 U. S. 8.

The uncertainty of the statute in the use of the word "obscene" cannot be better illustrated than by referring to the variety of meaning that has been attached to it in the various prosecutions had under it in the various District Courts of the United States. Not less than 26

cases [1] have been before the District Courts of the United States for the definition of the words of this statute, and the various definitions have been almost as numerous as the cases before them. *Tot homines quot sententiae.*

The uncertainty of the law is as obnoxious to "due process of law" as it is to the requirement of informing the accused of the nature of the accusation against him. Until the legislature has defined a crime in definite words it has not made a valid law; there can be no due process of law to enforce it.

That such uncertainty in a statute creating a punishment for an act which is *malum prohibitum* only, which in its practical operation and enforcement unavoidably involves judicial legislation in defining the crime after the commission of the act, whether left to the court or to a jury, is an *ex post facto* law, and carries with it all the evils that the framers of the Constitution sought to avoid by forbidding such enactment. See *Rosen* v. *United States*, 161 U. S. 29.

The indictment is insufficient.

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[1] *United States* v. *Bennett*, Fed. Cas. No. 14, 571; *United States* v. *Britton*, 17 Fed. Rep. 733; *United States* v. *Brazeau*, 78 Fed. Rep. 463; *United States* v. *Coleman*, 131 Fed. Rep. 829; *United States* v. *Commerford*, 25 Fed. Rep. 903; *United States* v. *Clark*, 37 Fed. Rep. 107; *United States* v. *Cheesman*, 19 Fed. Rep. 498; *United States* v. *Clarke*, 33 Fed. Rep. 402; *United States* v. *Clarke*, 38 Fed. Rep. 734; *United States* v. *Davis*, 38 Fed. Rep. 327; *United States* v. *Debout*, 28 Fed. Rep. 523; *United States* v. *Harman*, 45 Fed. Rep. 421; *United States* v. *Lamkin*, 73 Fed. Rep. 463; *United States* v. *Moore*, 129 Fed. Rep. 160; *United States* v. *Martin*, 50 Fed. Rep. 921; *United States* v. *Males*, 51 Fed. Rep. 42; *United States* v. *Redd*, 176 Fed. Rep. 944; *United States* v. *Smith*, 45 Fed. Rep. 418; *United States* v. *Smith*, 45 Fed. Rep. 477; *United States* v. *Shepherd*, 160 Fed. Rep. 584; *United States* v. *Slenker*, 32 Fed. Rep. 695; *United States* v. *Smith*, 11 Fed. Rep. 664; *United States* v. *Timmons*, 85 Fed. Rep. 205; *United States* v. *Wroblensky*, 118 Fed. Rep. 496; *United States* v. *Williams*, 4 Fed. Rep. 485; *United States* v. *Wrightman*, 29 Fed. Rep. 636.

The facts and record in this case make it distinguishable from the *Rosen Case*, 161 U. S. 29.

The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else, has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. The general rule requires an indictment to be specific. *Stephens* v. *State*, Wright (Ohio), 73; *Commonwealth* v. *Gillespie*, 7 Serg. & R. 469; *Commonwealth* v. *Stow*, 1 Massachusetts, 54; *Commonwealth* v. *Bailey*, 1 Massachusetts, 62; *Commonwealth* v. *Sweney*, 10 Serg. & R. 173; *Commonwealth* v. *Wright*, 1 Cush. 46; *Commonwealth* v. *Tarbox*, 1 Cush. 66; *Commonwealth* v. *Houghton*, 8 Massachusetts, 107; *King* v. *Beere*, 12 Mod. 219; *State* v. *Parker*, 11 Am. Dec. 735. See also *Commonwealth* v. *Stevens*, 1 Massachusetts, 203. The Constitution forbids in a certain class of cases prosecution except by indictment; therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is entitled, under the Constitution, to know the secrets of the grand jury room.

The Solicitor General for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This appeal is prosecuted to review the order of the District Court denying petition of appellant to be discharged in proceedings for *habeas corpus* from the custody of the Warden of the United States Penitentiary at Atlanta, Georgia.

The petition alleges the following: On the 21st of July, 1911, while appellant was temporarily in Wilmington, Delaware, he was arrested and charged with peddling books without a license and was convicted in the Municipal Court of the city and fined $5.00. The judgment was

almost immediately remitted and he was re-arrested and charged with having deposited in the United States mails a copy of an obscene book, and by one William G. Mahaffy, a United States commissioner, committed to the custody of the warden of the Newcastle County Workhouse to await the action of the grand jury. Under the direction of the United States Attorney his rooms were pillaged and all of his possessions, clothing, books, etc., were carried off and deposited in the United States court house. Before his conviction he was stripped of his clothing, dressed in prison garb, harsh prison rules were enforced against him and he was fed on unwholesome food. He was so confined and treated until a grand jury, selected by the commissioner who had committed him, found an indictment against him charging him with having deposited an obscene book in the United States mails, and, without seeing a copy of the indictment or knowing its contents, he was arraigned in his prison clothes, notwithstanding the indictment charged no offense against the laws of the United States and was couched in vague and uncertain language that did not apprise him of the offense, defects which he brought to the attention of the judge of the District Court, by pleas to the jurisdiction, demurrers and motions to quash, all of which were overruled, and he was placed on trial before a jury selected by the commissioner who had committed him. Although the array was challenged for that cause and the number of peremptory challenges prescribed by law were not allowed him, he was forced to trial, and the jury under instructions from the court was constrained to find a verdict against him, papers material to his defense having been withheld by the United States Attorney, with the acquiescence of the judge, and process for non-resident witnesses having been refused.

Motions in arrest of judgment and for a new trial were filed and the hearing thereof fixed for January 6, 1912, before Edward G. Bradford, District Judge, who, having,

the petition alleged, exhibited during the trial a deep-seated prejudice against appellant and a violent partiality in his rulings for the United States Attorney, appellant in good faith, as in law he was entitled to do, filed an affidavit charging him, the District Judge, with prejudice, and an application to have the same certified to the senior Circuit Judge, then present in the Circuit Court of Appeals for the Third Circuit, together with the certificate of counsel as required by law.

The petition further alleged that by the filing of the same and by operation of the act of March 3, 1911, 36 Stat. 1087, c. 231, which went into operation January 1, 1912, the District Judge became and was disqualified to further proceed in said cause, and any further action taken by him was without jurisdiction and absolutely null and void; further alleged that the judge forbade the clerk to enter of record the affidavit, forbade the clerk to certify the same to the senior Circuit Judge, proceeded to overrule the motions in arrest of judgment and for a new trial, and, against the protest of appellant, sentenced him to confinement in the penitentiary at Atlanta, Georgia, for a term of fifteen months from the sixth of January, 1912, and to pay a fine of $500.

Appellant, the petition alleged, was placed in the hands of the United States Marshal and by him imprisoned by force in his (the Marshal's) office from about 1 P. M., January 6, 1912, without being permitted to return to the court house to get his personal property there, and at midnight was spirited away by a circuitous route to Norfolk, Virginia, where he was imprisoned all night and all of the next day (Sunday). Thence he was taken, manacled, without being supplied with food or being allowed to purchase any, and delivered under the unlawful order of the District Court to the custody of the appellee, by whom he has ever since been confined in the penitentiary at Atlanta, Georgia.

Appellant, the petition alleged, is by the action recited not only unlawfully imprisoned, but, by the refusal to certify his application, affidavit and certificate of counsel to the senior Circuit Judge, "there is now no judge of the United States District Court of Delaware, and no one there authorized to pass upon his motions in arrest of judgment or motion for a new trial, or competent to sit and certify to the exceptions reserved by him to the many errors committed by said Judge Bradford during his trial, or to permit him to have the same reviewed and set aside by an appellate tribunal."

The allegations of the petition were denied by the District Judge. A writ of *habeas corpus* was prayed, to the end that appellant be discharged or cause to the contrary be shown.

The writ was issued, but upon its return and hearing appellant was remanded to custody.

The court, as grounds for its decision, said: "The real question in this case is whether or not under § 21 of the new Judicial Code, an affidavit such as provided for therein, can be filed after a case has been tried" and verdict rendered, and where the attempt is to disqualify a judge from pronouncing sentence. The court pointed out that in the case at bar there was also the circumstance that the case had been tried and the verdict rendered before the Code went into effect, and the court thought that it could not be conceived that it was the purpose of Congress to apply the act to such a situation, the section itself providing that the affidavit should be filed not less than ten days before the beginning of the term of the court or good cause shown for failure to file within that time. The court said further: "It would require some specific language in this act to satisfy me that Congress intended such an affidavit to be filed at the stage which had been reached in this case."

The court, however, finally concluded that the action of the District Court of Delaware "was a matter for review by the Circuit Court of Appeals on writ for error" and was "clearly beyond the proper scope and use of the" writ of *habeas corpus*.

The assignments of error attack the action of the District Court for error (1) in holding that §§ 20 and 21 of the Judicial Code did not apply to the case at bar; (2) in holding that Judge Bradford had jurisdiction to impose the imprisonment complained of; and (3) in refusing the writ and dismissing the petition. But questions are raised here which were not presented in the petition in the court below or passed on by that court. Section 211 of the Criminal Code act of March 4, 1909, 35 Stat. 1088 (which makes it a crime to deposit obscene books in the mails),[1] under which appellant was indicted, is attacked as unconstitutional because (a) it is not within

[1] "SEC. 211. Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, . . . is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, . . . shall be fined not more than five thousand dollars or imprisoned not more than five years, or both."

"SEC. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. . . ."

the constitutional grant of legislative power to Congress, in that it does not confine its operation to depositing matter in the United States post-office or other authorized depositary for United States mail; (b) it does not inform appellant of the nature of the accusation against him nor describe an offense with certainty; (c) it is an *ex post facto* law; (d) appellant was deprived of his liberty and property without due process of law. It is also asserted that § 211 does not create an offense against the United States.

Appellant, however, even if, in the absence of all proof of their truth, the recitals of the petition which we have previously stated be accepted for the purpose of this proceeding only as true, encounters an obstacle to a consideration of his contentions in the limitation upon the scope of a writ of *habeas corpus,* and this limitation was the ultimate ground of the decision of the District Court.

The writ of *habeas corpus* cannot be made to perform the office of a writ of error. This has been decided many times, and, indeed, was the ground upon which a petition of appellant for *habeas corpus* to this court, before his trial, was decided. It is true, as we have said, that the case had not then been tried, but the principle is as applicable and determinative after trial as before trial. This was decided in one of the cases cited.—*In re Lincoln,* 202 U. S. 178, which cited other cases to the same effect. Subsequent cases have made the principle especially pertinent to the case at bar. *Harlan* v. *McGourin,* (218 U. S. 442) was an appeal from a judgment discharging a writ of *habeas corpus* petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error but was confined to a determination whether the restraint of liberty was without authority of law. In other words, as it was said, "Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions."

Matter of Gregory, 219 U. S. 210, was a writ of *habeas corpus* brought after conviction, and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render judgment. And for this many cases were cited.

The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in *habeas corpus*, and that his petition was denied on the ground that his proper remedy was by writ of error after trial. In his petition he charged mistreatment by the prison authorities, the taking of his papers and property from his room and from the express office, and, that although he informed the United States Attorney, no permission was granted him to examine his papers for his defense. He also in the petition attacked the indictment against him on the ground that it described no offense against the laws of the United States nor an offense "against any valid law of the United States and afforded no justification for his imprisonment." The petition was accompanied by a brief which presented the same contentions as those now presented, though less elaborately.

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the District Court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the Circuit Court of Appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

Order discharging writ affirmed.